[Cite as *State v. Washington*, 2018-Ohio-3545.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 17CA8
vs.	:	
ANDRAYA L. WASHINGTON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy P. Gleeson, Logan, Ohio, for appellant.

Jason Holdren, Gallia County Prosecuting Attorney, and Jeremy Fisher, Gallia County Assistant Prosecuting Attorney, Gallipolis, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-22-18
ABELE, J.

{¶ 1} This is an appeal from a Gallia County Common Pleas Court judgment of conviction and sentence for complicity to trafficking heroin. Andraya Washington, defendant below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"JUDICIAL FACT FINDING THAT INCREASED WASHINGTON'S SENTENCE VIOLATED HER SIXTH AMENDMENT RIGHT."

SECOND ASSIGNMENT OF ERROR:

"THE SENTENCING COURT'S FINDINGS ARE NOT SUPPORTED

BY THE RECORD."

{¶ 2} On December 15, 2016, a Gallia County Grand Jury returned an indictment that charged appellant with (1) one count of possession of drugs in violation of R.C. 2925.11(A), and (2) one count of trafficking in drugs in violation of R.C. 2925.03(A)(2). Both offenses are first-degree felonies. The indictment alleged that appellant possessed and trafficked 98.967 grams of heroin.

{¶ 3} At appellant's jury trial, Ohio State Highway Patrol Trooper Matthew Atwood testified that on October 14, 2016 he stopped a car for too closely following another car. Appellant was a passenger in the vehicle. The driver identified himself as David Hudson, appellant's fiancé. Trooper Atwood testified that he also observed Hudson's hands "shaking violently," and that Hudson said his driver's license had been suspended. When their statements did not match and their stories changed, Trooper Atwood asked for consent to search the vehicle. After Hudson consented, Trooper Atwood found under the passenger seat a fast-food bag that contained heroin. Trooper Atwood testified that after he advised appellant of her Miranda rights, she stated that (1) she possessed and trafficked heroin, and (2) she and Hudson had transported drugs several times from Dayton to Gallia County.

{¶ 4} Brandon Werry, Ohio State Highway Patrol Crime Laboratory Director, testified about testing four separate exhibits. Each exhibit contained heroin, and together totaled approximately 98 grams.

{¶ 5} At the close of the state's case, appellant made a Crim.R. 29 motion for judgment of acquittal. The trial court overruled the motion.

{¶ 6} Appellant's father, Andre Washington, testified on appellant's behalf. Washington stated that when he spoke with appellant on the morning in question, she did not mention anything of

an illegal nature. Appellant also testified on her own behalf. Appellant stated that on October 14, 2016, she was going to a class to assist her with employment. She explained that she is a young, single mother and had a life coach to assist her. She testified that Hudson told her that he needed to go to Gallipolis to "pick up some money." Although appellant stated at trial on direct examination that she did not know about the drugs in the car, on cross-examination she admitted that she told the officer that she was taking drugs to a person in Gallipolis and that she and Hudson made these runs several times. Moreover, in the patrol car video appellant stated "We come up here. We do runs. We get money. We go home. * * * I've been on this run twice, maybe three times."

{¶ 7} At the conclusion of the trial, appellant renewed her Crim.R. 29 motion for judgment of acquittal. The trial court once again overruled the motion. After deliberation, the jury found appellant guilty of both charges. The court determined that the two charges merged for the purposes of sentencing, and the state elected to proceed on the charge of complicity to trafficking heroin (fifty grams but that is less than one hundred grams). The court also concluded that, as set forth in R.C. 2929.12(B)(7), appellant committed this offense for hire and as a part of an organized criminal activity. The court noted that appellant had no prior convictions [R.C. 2929.12(D)(5)], but stated its belief that the circumstances of the crime are likely to recur [R.C. 2929.12(E)(4)]. The court noted that the amount of the heroin (98.967 grams) is only 1.033 grams below the category of major drug offender, and would have caused great harm to citizens of Gallia County. Consequently, the court (1) sentenced appellant to serve nine years in prison for complicity to trafficking drugs along with five years of postrelease control; and (2) ordered appellant to pay a $10,000 mandatory fine. This appeal followed.

{¶ 8} Because appellant's assignments of error raise related issues, we consider them

together. In her first assignment of error, appellant asserts that improper judicial fact finding resulted in an increased sentence and violated the Sixth Amendment to the United States Constitution. In particular, appellant argues that the trial court made additional factual findings beyond the facts that the jury found beyond a reasonable doubt, including: (1) appellant committed the offense for hire and as part of an organized criminal activity, (2) appellant participated in these deliveries before and, it can be presumed, that these particular actions are part of her life, and (3) the ripple effect of drug activity would have plagued the citizens of Gallia County.

{¶ 9} In general, R.C. 2953.08(G)(2) sets forth the standard of review when considering a challenge to a trial court's criminal sentencing decision:

> "(2) The court hearing an appeal under division (A), (B), or © of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
> "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
> "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
> "(b) That the sentence is otherwise contrary to law."

{¶ 10} The Supreme Court of Ohio has clarified that courts may vacate or modify a sentence that is not clearly and convincingly contrary to law only if the court finds, by clear and convincing evidence, that the record does not support the sentence. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, paragraph two of the syllabus; R.C. 2953.08(G). "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in

criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Marcum* at ¶ 22, citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Thus, we are authorized to "increase, reduce, or otherwise modify a sentence only when [we] clearly and convincingly find * * * that the sentence is (1) contrary to law and/or (2) unsupported by the record." *State v. McGowan*, 147 Ohio St.3d 166, 2016-Ohio-2971, 62 N.E.3d 178, ¶ 1.

{¶ 11} When sentencing a felony offender, a trial court must consider the R.C. 2929.11(A) purposes of felony sentencing and the R.C. 2929.12(A) seriousness and recidivism factors. However, sentencing courts are not required to use specific language and render precise findings to satisfactorily "consider" the relevant seriousness and recidivism factors. *State v. Long*, 11th Dist. No. 2013-L-102, 2014-Ohio-4416, 19 N.E.3d 981, ¶ 79.

{¶ 12} Appellant argues that in *State v. Willan*, 144 Ohio St.3d 94, 2015-Ohio-1475, 41 N.E.3d 366 the Supreme Court of Ohio restated the judicial fact finding restrictions of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Generally, the Sixth Amendment, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *Apprendi, supra,* 530 U.S. at 477. In *Apprendi*, the United States Supreme Court explained that the elements of a crime include, not just those facts that establish guilt, but also those "facts that expose a defendant to a punishment greater than that otherwise legally prescribed." *Id.* at 483, 120 S.Ct. 2348, fn. 10. Therefore, "any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348. In *Willan*, the Supreme Court of Ohio explained

that *Alleyne* is an extension of the *Apprendi* rule: "What *Apprendi* did for statutory maximums, *Alleyne* does for mandatory minimums. Its premise is simple: 'judicial factfinding that increases the mandatory minimum sentence for a crime' violates the Sixth Amendment. *Alleyne*, 133 S.Ct. at 2155, 186 L.Ed.2d 314. It's practical upshot is simpler still: 'facts that increase mandatory minimum sentences must be submitted to the jury.' *Id.* at 2163. Consequently, a judge cannot impose a sentence that relies on facts not reflected in the jury's verdict. *Apprendi* at 483, 120 S.Ct. 2348; *Blakely v. Washington*, 542 U.S. 296, 304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)." *Willan* at ¶ 14. However, as the court noted in *Willan*, "judges still have a seat at the sentencing table. The *Apprendi/Alleyne* line of cases prohibits judges only from finding 'facts' that increase punishment, not from making legal determinations that increase punishment. *Alleyne* at 2155; *James v. United States*, 550 U.S. 192, 214, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (sentencing determination did not implicate *Apprendi*, because it required 'statutory interpretation, not judicial factfinding'); *United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir.2013) ('*Apprendi* does not apply to every "determination" that increases a defendant's maximum sentence')." *Willan* at ¶ 15. Thus, the *Willan* court concluded that, while the jury forms did not expressly state any of the court's conclusions, it did not amount to an *Alleyne* violation "because none of the necessary findings were findings of fact. They were findings of law." *Willan* at ¶ 17.

{¶ 13} Appellant acknowledges in the case sub judice that her case did not involve a sentence greater than the maximum, as in *Apprendi*, nor did it involve an increased mandatory minimum, as in *Alleyne*. However, appellant submits that judicial fact finding in her case resulted in the imposition of a 9 year mandatory term rather than a 3 year mandatory term. In particular, appellant asserts that the trial court alone found that appellant committed the offense for hire and as

part of an organized criminal activity, that appellant previously participated in these deliveries, that these actions are "just part of her life," and that the ripple effect of drug activity and crime would have plagued the citizens of Gallia County. Thus, appellant urges this court to reduce her sentence to a 3 year mandatory prison term, or, in the alternative, to vacate her sentence and remand the matter to the trial court for resentencing. However, we point out below we believe that the matters appellant raises in this appeal simply constitute legal determinations or statutory interpretations, not judicial factfinding.

{¶ 14} One of the appellant's contentions is that the trial court erred by making certain particular determinations, including (1) that she acted as part of organized criminal activity, and (2) that these criminal actions are "just part of her life" as a seriousness factor. R.C. 2929.12(B) provides in part: "(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense: * * * (7) The offender committed the offense * * * as a part of an organized criminal activity." Here, the trial court observed, as set forth in R.C. 2929.12(B)(7), that appellant committed this offense for hire and as part of an organized criminal activity:

> "The Defendant and her fiancé told the officer that they had made several trips to Gallipolis to deliver drugs to a person named 'Greg,' and told the officer the address in Gallia County where they deliver the drugs. Defendant is heard on the video of the stop detailing the procedure they use to contact someone when they arrive in Gallia County. The Defendant and her fiancé pick up the heroin in Dayton from a man called "T" and transport the drugs to Gallia County, taking money for the same back to Dayton. Defendant and her fiancé were paid to make these trips. Further, although Defendant spoke to the Court of her poor choices in friends and men, her naivete and her devotion to her son, she did not express remorse for committing a crime. Defendant still maintained that she had no part in the scheme - apart from being with the wrong people and at the wrong place at the wrong time.

2929.12(D)(5)."

The state points out that neither the term "organized criminal activity" nor the term "offense for hire" are defined in R.C. Chapter 2929. "As such, courts must determine on a case-by-case basis whether an offense is part of an organized criminal activity." *State v. Martinez*, 6th Dist. Wood No. WD-01-027, 2002-Ohio-735, * 6. "Commentators have defined an 'organized criminal activity' as 'criminal activity which because of the number of participants and planned utilization of those participants poses more of a risk to the public order than an activity carried out by a single individual acting in isolation from other offenders or than multiple individuals acting together spontaneously or impulsively." Griffin and Katz, Ohio Felony Sentencing Law (1999), 368-369, Section T. 4.14.3. Further, as the *Martinez* court stated, "it is noteworthy that R.C. Chapter 177, titled 'Investigation and Prosecution of Organized Criminal Activity' defines 'organized criminal activity' as 'any violation, combination of violations, or conspiracy to commit one or more violations of section 2925.03 of the Revised Code.' R.C. 177.01(E)(1)." *Martinez, id.*

{¶ 15} The Sixth Appellate District wrote in *Martinez* that " [i]n our view, drug trafficking by its very nature is part of an organized criminal activity in that the seller must obtain the drugs from a supplier and is only one link in a long chain of illegal activity. The Ohio General Assembly seems to have recognized this in its definition of 'organized criminal activity' in R.C. 177.01(E)(1)." *Id.* The *Martinez* court concluded that based on that view, and based on the defendant's statements that he purchased drugs from three people and sold drugs to five people over a three year period, the record supported the trial court's finding that appellant engaged in an organized criminal activity. *Id.*

{¶ 16} Other courts have also spoken to this issue. The Sixth District concluded that when a

defendant received large quantities of marijuana from another individual, and worked in concert with several individuals, the record supported the trial court's finding that the defendant engaged in organized criminal activity. *See State v. Obregon*, 6th Dist. Sandusky No. S-99-042, 2000 WL 1205446, *3. However, when the First District considered the same issue in *State v. Shryock*, 1st Dist. Hamilton No. C-961111, 1997 WL 1008672 (Aug.1, 1997), the court held: "[s]imply because two or more people coordinate their criminal conduct does not, *ipso facto*, make their conduct 'organized criminal activity.' The court concluded that no evidence suggested that the defendant's conduct with his partner was part of a larger, well-organized conspiracy, or that it was committed for hire or for profit. *Shryock* at *2. The Eleventh District added more to the analysis in *State v. Eckliffe*, 11th Dist. Lake No. 2001-L-104, 2002-Ohio-7135. In *Eckliffe*, the defendant was convicted of two counts of trafficking in cocaine. The court referred to Griffin and Katz at 61, who noted that "it would seem that only when an essential element of the offense that is also *a listed factor* under R.C. 2929.12(B) is *present to a higher degree than normal* should the presence of [that] factor increase the penalty. (Emphasis added.)" *Eckliffe* at ¶ 26. The court went on to hold that "[w]e agree with the Sixth Appellate District that, by its very nature, trafficking in cocaine denotes participation in organized criminal activity. Nevertheless, we determine that the trial court should make findings that support a conclusion that a particular trafficker's involvement in organized criminal activity is greater than normal for someone engaged in the street sale of illicit drugs. It is inappropriate for the court to find that an offender's participation in organized criminal activity inherently involved in any level of trafficking would be sufficient to make his offense more serious than normal." *Eckliffe* at ¶ 26. Thus, the *Eckliffe* court concluded that the defendant appeared to have acted independently without accomplices, and the amount of cocaine involved was relatively

small. "A streetwise commentator might well describe him as a tadpole among the sharks, which constitute the hard core of organized crime." *Id.* at ¶ 27.

{¶ 17} In the case sub judice, the state contends that several levels of organization surround this particular incident. A dealer or supplier from Dayton paid transporters to deliver the controlled substance to a local dealer in Gallia County. Also, the amount of heroin is substantial - just shy of the major drug offender category. At trial, appellant testified that she had never met the intended recipient of the drugs, but in the video exhibit she tells Trooper Atwood that "he's Caucasian with dark hair, usually shaves and blue eyes." Even more poignant, in the video appellant gave details about how the drug runs from Dayton to Gallipolis worked, including how she and Hudson communicated with the intended recipient, where they stopped when they arrived in Gallia County, and how they collected money and returned to Dayton. Although at trial appellant attempted to distance herself from the transactions, the video exhibit depicts appellant using the term "we" multiple times when she referred to the drug transactions. Tellingly, the video also reveals that appellant made incriminating statements at the scene, "We come up here. We do the runs. We get the money. We go home. I've been on this run twice, maybe three times." In view of this evidence, we believe that the trial court judge had ample information before it to readily conclude that appellant committed the offense for hire, as part of an organized criminal activity, and that her actions were "just part of her life."

{¶ 18} Finally, appellant challenges trial court's statement that the effect of appellant's drug involvement would have plagued the citizens of Gallia County. The court recognized that the amount of heroin involved in this case, which was nearly the quantity required for the major drug offender category, would have devastated an already besieged area. *See State v. Wagner*, 4th Dist.

Adams No. 16CA1033, 2017-Ohio-8653, ¶ 14. We believe that the evidence adduced at trial fully support the trial court's view. Thus, these legal conclusions are not contrary to law. Although appellant asserts that the record does not support the sentencing court's findings because she is a youthful, first time offender, the evidence reveals that she willingly and voluntarily involved herself in a for profit criminal enterprise in which she regularly participated. Here, we believe that the trial court appropriately applied the sentencing guidelines.

{¶ 19} Accordingly, based upon the foregoing reasons, we overrule appellant's assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

{¶ 20} I concur in the judgment overruling Washington's assignments of error. However I take a different approach to address her first assignment of error, which claims that the trial court erred by engaging in impermissible judicial factfinding in imposing a sentence of nine years instead of three, both of which were within the statutory range.

{¶ 21} As the majority opinion notes judicial factfinding that increases either the statutory mandatory minimum or the statutory maximum for the crime, i.e. the range of penalties, violates the Sixth Amendment right to a jury trial. *See Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *State v. Willan*, 144 Ohio St.3d 94, 2015-Ohio-1475, 41 N.E.3d 366. Because this case involves neither sentencing that increases the statutory mandatory minimum nor the statutory maximum, none of these cases are controlling.

{¶ 22} Washington seeks to extend the holdings of these cases to sentencing decisions within the statutory range, yet she cites no case that has done so. I would not apply any test from those cases that addresses the distinction between factual and legal interpretations outside of their limited context. The Ohio Supreme Court has held that the general-guidance sentencing statutes of R.C. 2929.11 and 2929.12 do not constitute impermissible judicial factfinding because they merely require courts to "consider" the statutory factors to determine a sentence within the statutory range. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 36-42. That portion of *Foster* was not abrogated by the United States Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009) (Sixth Amendment does not inhibit States from assigning to judges, rather than to juries, finding of facts necessary to imposition of consecutive, rather than

concurrent, sentences for multiple offenses). Significantly, in *Ice*, 555 U.S. at 172, the United States Supreme Court cautioned against expanding its *Apprendi* doctrine beyond "its necessary boundaries."

{¶ 23} Therefore, I find it unnecessary to apply any test set forth in *Willan*, *Apprendi*, or *Alleyne* to determine whether a Sixth Amendment violation occurred here. And because Ohio precedent holds that a trial court's consideration of the sentencing factors in R.C. 2929.11 and 2929.12 does not constitute impermissible judicial factfinding, I concur in the judgment overruling Washington's assignments of error and affirming her sentence.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J.: Concurs in Judgment & Opinion with lead opinion on Assignment of Error II and with Concurring Opinion on Assignment of Error I.
Harsha, J.: Concurs with Concurring Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.